



No. 76-1636

**In the
Supreme Court of the United States**

October Term, 1976

**ARIZONA STATE DENTAL ASSOCIATION,
an Arizona Non-Profit Corporation;
CENTRAL ARIZONA DENTAL SOCIETY,
an Arizona Non-Profit Corporation;
AMERICAN DENTAL ASSOCIATION,
an Illinois Non-Profit Corporation,**

Petitioners,

vs.

**VERNON S. BODDICKER, RICHARD W. PEAY,
HUGH L. THOMPSON and DWIGHT G. HUDSON,**
Respondents.

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The majority opinion of the Court of Appeals reversing the District Court, as well as the dissenting opinion, are reported at 549 F. 2d 626 (January 6, 1977; as amended on denial of rehearing and rehearing en banc March 1, 1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioners' statement of the questions presented is, in our opinion, inadequate. The only questions are:

1. Did the Court of Appeals err in holding that Respondents' First Amended Complaint alleged practices not beyond the scope of the Sherman Act?
2. Did the Court of Appeals err in holding that Respondents' First Amended Complaint should not be dismissed for failure to state a claim?

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete, distorted and insufficient. The facts of the case are fully and adequately stated in the majority opinion of the Court of Appeals, which we adopt, as follows:

"Defendants (Petitioners) ASDA and CADS are non-profit corporations organized under the laws of Arizona. Briefly summarized, the identical objectives and purposes of the ASDA and the CADS are to improve public health and the profession of dentistry by encouraging research, disseminating new knowledge in the profession, advancing the standard of dental education, enlightening the public in relation to oral hygiene and advanced dental service, and promoting and maintaining a high order of professional excellence. Membership in the ASDA and the CADS is not a prerequisite to the practice of dentistry in Arizona; plaintiffs (Respondents), however, derive substantial benefits from such membership including participation in continuing education programs, group insurance, the exchange of information with and the referral of patients by fellow members, and the entry into various specialty organizations of dentistry. Pursuant to the by-laws of the ADA and the ASDA, a dentist may not become or

remain a member in good standing in the ASDA or the CADS without also being a member of the ADA. The by-laws of the ADA designate the ASDA as a constituent society; the by-laws of the ASDA designate the CADS as a component society. The ASDA and the CADS remit the dues which they collect on behalf of the ADA to the ADA at its central office in Illinois. Plaintiff (Respondent) Vernon S. Boddicker tendered the annual dues for the ASDA and the CADS, excluding the annual dues for the ADA; the CADS rejected this tender and with the ASDA dropped him from their rolls. Plaintiffs (Respondents) Richard W. Peay and Hugh L. Thompson paid under protest the annual dues of all three organizations in order to retain their status as members in good standing of the ASDA and the CADS.

"Defendant (Petitioner) ADA is a nonprofit corporation organized under the laws of the State of Illinois. It provides a large range of services for dentists across the nation. A sampling of its nationwide activities is as follows: the publication and dissemination of journals, a newspaper, and newsletters, the conducting of dental aptitude tests, the accreditation of dental programs for hospitals, the providing of insurance programs for its members, and the dispatch of speakers to various states. As a result of its system of designating local organizations as constituent societies, which in turn require membership in it as a condition precedent to constituent society membership, the ADA collected in annual dues for 1972 an amount in excess of \$6,000,000.

"According to the amended complaint, expulsion from the local societies for failure to pay the ADA's dues will impair the ability of plaintiffs (Respondents) to practice dentistry in that they will be prevented from participating in the programs and activities of the

ASDA and the CADS. Moreover, plaintiffs (Respondents) alleged that payment of dues to the ADA for which they receive no benefit is an unreasonable condition to membership in the ASDA and the CADS, and that this financial burden is passed on to the consumer in the form of increased dental costs. They also allege that the practice of dentistry throughout the nation is similarly affected."

We would also add, as a part of the Statement of the Case, Footnote 4, appearing at the bottom of page 629 of the opinion, as follows:

"4. In addition, plaintiffs (Respondents) contend that expulsion from the local societies will diminish their practice and professional reputation. A less vigorous dental practice necessarily includes the use of fewer supplies, less equipment, etc. Although the amount of interstate commerce affected by the deterioration of three dentists' practices may seem insubstantial, like effects on the practices of similarly situated dentists across the nation probably will result in the altered flow of dental supplies in interstate commerce. See *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973)."

ARGUMENT

As a basic premise, we are primarily concerned with the sufficiency of the First Amended Complaint as targeted by Defendants' (Petitioners') Motion to Dismiss.

"A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Page 632, majority opinion; *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 746, 96 S. Ct. 1853 (1976), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); see also *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974).

Petitioners complain that *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975) has created confusion in the application of the antitrust laws to "clearly non-commercial activities of professional associations." The petitioner in *Goldfarb* occupied a position somewhat analogous to the Respondents in this case, in that Mr. Goldfarb, personally, was not involved in interstate commerce but, by reason of the activities of the defendants was caught up in, and became a victim of, the flow of commerce resulting from the activities of the defendant lawyers. Here, the Respondents only seek to practice their profession within the State of Arizona, unhampered by the activities of, and the resulting restrictions imposed by, the Petitioners.

In *Greenville Publishing Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 396 (4th Cir. 1974), the accused party took a position similar to that raised herein by the Petitioners. In disposing of the issue, the Court said:

"The Supreme Court's approach strongly implies that the Sherman Act protects the market as well as the victim*** Defendant's theory would undermine that protection. It would allow an interstate trader to destroy local competitors as long as it acted before they captured any of the interstate trade. To avoid such a result, we hold that the Sherman Act applies to the alleged monopolization of an interstate market even though the immediate victim may not be engaged in interstate commerce.***"

See also *Mims v. Kemp*, 516 F.2d 21,23 (4th Cir. 1975). And the majority opinion, beginning on Page 629, aptly states the applicable rule by stating:

"Moreover, the exclusion of the plaintiffs from the ASDA and the CADS pursuant to the dues arrangement can be considered 'an inseparable element of a larger program dependent for its

success upon activity which affects commerce between the states' ",

citing *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 297, 65 S.Ct. 661, 663 (1945), quoted in *Goldfarb v. Virginia State Bar*, in 421 U.S. at page 784, 95 S.Ct. at page 2011-2012 (1975).

Lehrman v. Gulf Oil Corporation, 464 F.2d 26, 33 (5th Cir. 1973) involved one lone service station operated in a small town in Texas. Lehrman alleged that Gulf's system of setting wholesale prices forced him out of business. In following *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051 (1964), the Court held (Page 33):

"It is clear from Simpson that a single, intrastate dealer may sue in treble damages if he is the victim of a broad practice whose adverse effect on compensation may be determined on its face. The suit is allowed because 'Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but to vindicate the important public interest in free competition.' * * * "

And the Court also said (Page 36):

"No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involvement in interstate commerce as they find them."

See also *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236-237, 68 S.Ct. 996, 1006 (1948).

Plaintiffs (Respondents) have alleged in their First Amended Complaint (Record on Appeal, at page 338) that the tying arrangement, perpetrated, fostered and enforced by the ADA, in concert with the ASDA and CADS "and all other constituent and component societies across the United States, is designed to create, and has created, a monopoly whereby the said ADA, in concert with the constituent and component societies, has obtained

virtually complete control over the activities of all dentists in the United States, their insurance, their education and patient exchange or referral of patients and, in the main, their ability to earn a livelihood in their profession and their methods of serving the public." That the activities of the ADA "are conducted, fostered and carried on by means of interstate commerce, * * * "; that all of the contacts of the ADA "with its members as well as all purported constituent and component societies in the several states, are carried on and conducted in interstate commerce. Furthermore, its operation and existence is dependent upon interstate commerce." Thus, the First Amended Complaint contains explicit allegations as to the interstate commerce activities of the Petitioners, the details of the interstate activities, and the impact and effect of those activities upon interstate commerce and the Respondents and all dentists, as a class, so similarly situated. Respondents sought relief in the First Amended Complaint not only for themselves but for all dentists of the class.

Under the heading "Substantial Practical Problems", Petitioners raise the specter of disaster as related to membership in private clubs and, as a further example, an individual desiring to belong to the Antitrust Section of the American Bar Association (ABA) without being a member of the ABA. However, we submit Petitioners misconstrue, and actually distort, the relief sought by Respondents, who only seek to be able to belong to their local societies and specialty groups, free from the restrictions imposed by the ADA, nurtured and fostered by the ASDA and CADS. They do not seek a "free ride".

The ABA is a good example of the success to be enjoyed by a strictly voluntary organization. Many of the ABA seminars, on a variety of topics, are attended by indivi-

duals who are not even members of the ABA. And there is no requirement imposed by the ABA as to state or local bar associations.

The whole rationale in this area is that organizations, as well as products, should stand on their merits. Accordingly, for this very reason, the tying arrangement imposed by the ADA constitutes a per se violation of the Sherman Act.

Petitioners contend that the position of the Court of Appeals, by its opinion, is inconsistent with the decisions of other Circuits. With this statement we most heartily disagree. See *United States v. Bensinger Co.*, 430 F.2d 584, 588-589 (8th Cir. 1970); *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975).

CONCLUSION

For the reasons set forth above, the Respondents herein submit that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,
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PROOF OF SERVICE

STATE OF ARIZONA }
County of Maricopa } ss.

CARL W. DIVELBISS, being first duly sworn, upon oath, deposes and says:

That he is one of the attorneys for the Respondents, above named; that he makes this affidavit for and on behalf of the Respondents, being authorized so to do. That on the _____ day of June, 1977, affiant personally mailed two (2) copies of Respondents' Brief in Opposition to:

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135 South LaSalle Street
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Arizona State Dental Association
and Central Arizona Dental Society

That said two (2) copies of said Respondents' Brief in Opposition were placed in a sealed envelope, and the proper amount of first-class postage affixed thereto, each said envelope being addressed as aforesaid. The said envelopes, addressed as aforesaid, were placed in a

receptacle for mail, provided by the United States Post Office, in the Luhrs Tower, 45 West Jefferson Street, Phoenix, Arizona, on the aforesaid date.

SUBSCRIBED AND SWORN to before me this _____
day of June, 1977.

Notary Public

My Commission Expires:
